



NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 702

[NCUA-2022-0005]

RIN 3133-AF19

Prompt Corrective Action: Earnings Retention Waivers and Net Worth Restoration Plans

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interim final rule.

SUMMARY: The NCUA Board (Board) is extending two temporary changes to its prompt corrective action (PCA) regulations to help ensure that federally insured credit unions (FICUs) remain operational and liquid during the COVID-19 crisis. The first amends these regulations to temporarily extend the Board's ability to issue an order applicable to all FICUs to waive the earnings retention requirement for any FICU that is classified as adequately capitalized. The second extends a provision that modifies the specific documentation required for net worth restoration plans (NWRPs) for FICUs that become undercapitalized. These temporary modifications will remain in place until March 31, 2023. This rule is substantially similar to an interim final rule that the Board published on April 19, 2021 ("2021 PCA interim final").

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Comments must be received on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit written comments, identified by RIN 3133-AF19, by any of the following methods. Please send comments by one method only.

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments for Docket # NCUA-2022-0055.
- Fax: (703) 518-6319. Include “[Your Name]—Comments on “Prompt Corrective Action: Earnings Retention Waivers and Net Worth Restoration Plans” in the transmittal.
- Mail: Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.
- Hand Delivery/Courier: Same as mail address.

Public Inspection: You may view all public comments on the Federal eRulemaking Portal at <https://www.regulations.gov> as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect, the usual opportunity to inspect paper copies of comments in the NCUA’s law library is currently unavailable. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518-6540 or e-mailing OGCMail@ncua.gov.

FOR FURTHER INFORMATION CONTACT: *Policy and Analysis:* Kathryn Metzker, Risk Officer, or Victoria Nahrwold, Associate Director, Office of Examination and Insurance, at (703)

518-6360; *Legal*: Marvin Shaw, Senior Staff Attorney and Thomas Zells, Senior Staff Attorney, Office of General Counsel, at (703) 518-6540; or by mail at: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.

SUPPLEMENTARY INFORMATION:

I. Legal Authority

The Board is issuing this interim final rule pursuant to its authority under the Federal Credit Union Act.¹ The Act grants the Board a broad mandate to issue regulations that govern both federal credit unions and, more generally, all FICUs. For example, Section 120 of the Act is a general grant of regulatory authority and authorizes the Board to prescribe rules and regulations for the administration of the Act.² Section 209 of the Act is a plenary grant of regulatory authority to issue rules and regulations necessary or appropriate for the Board to carry out its role as share insurer for all FICUs.³ Other provisions of the Act confer specific rulemaking authority to address prescribed issues or circumstances.⁴ Such specific rulemaking authority is set forth in Section 216(b) about PCA.⁵

II. Prompt Corrective Action Background

A. Statutory Provisions

In 1998, Congress enacted the Credit Union Membership Access Act (“CUMAA”).⁶ CUMAA amended the Federal Credit Union Act (“the Act”) to require the NCUA to adopt, by regulation, a system of PCA consisting of minimum capital standards and corresponding

¹ 12 U.S.C. 1751 *et seq.*

² 12 U.S.C. 1766(a).

³ 12 U.S.C. 1789.

⁴ An example of a provision of the Act that provides the Board with specific rulemaking authority is Section 207 (12 U.S.C. 1787), which is a specific grant of authority over share insurance coverage, conservatorships, and liquidations.

⁵ 12 U.S.C. 1790d(b).

⁶ Pub. L. 105-219, 112 Stat. 913 (1998).

remedies to improve the net worth of federally-insured “natural person” credit unions.⁷ The purpose of PCA is to “resolve the problems of insured credit unions at the least possible long-term loss to the [National Credit Union Share Insurance Fund (‘NCUSIF’)].”⁸ The PCA section of the Act does not apply to corporate credit unions.⁹

The statute designated three principal components of PCA: (1) A framework combining mandatory actions prescribed by statute with discretionary actions developed by the NCUA; (2) an alternative system of PCA to be developed by the NCUA for FICUs which CUMAA defines as “new;” and (3) a risk-based net worth requirement to apply to FICUs which the NCUA defines as “complex.” Besides those FICUs that meet the statutory definition of a “new” FICU, CUMAA mandated a framework of mandatory and discretionary supervisory actions indexed to five statutory net worth categories. These categories are: “well capitalized,” “adequately capitalized,” “undercapitalized,” “significantly undercapitalized,” and “critically undercapitalized.” The mandatory actions and conditions triggering conservatorship and liquidation are expressly prescribed by statute.¹⁰ To supplement the mandatory actions, the statute directed the NCUA to develop discretionary actions which are “comparable” to the “discretionary safeguards” available under Section 38 of the Federal Deposit Insurance Act, which is the statute that applies PCA to other federally-insured depository institutions.¹¹

The Act addresses the earnings retention requirement applicable to FICUs that are not well capitalized.¹² Such FICUs are required to annually set aside as net worth an amount equal to not less than 0.4 percent of their total assets.¹³ The Board has the authority to decrease the earnings retention requirement.¹⁴ To do this, the Board may issue an order if it determines that the

⁷ 12 U.S.C. 1790d *et seq.*

⁸ 12 U.S.C. 1790d(a)(1).

⁹ 12 U.S.C. 1790d(m). Part 704, which this rulemaking does not affect, applies capital and PCA requirements to corporate credit unions.

¹⁰ 12 U.S.C. 1790d(e), (f), (g), and (i); 12 U.S.C. 1786(h)(1)(F); 12 U.S.C. 1786(a)(3)(A)(1).

¹¹ 12 U.S.C. 1790d(b)(1)(A); S. Rep. No. 193, 105th Cong., 2d Sess. 12 (1998) (S.Rep.); H.R. Rep. No. 472, 105th Cong; *see also* 12 U.S.C. 1831o (Section 38 of the Federal Deposit Insurance Act setting forth the PCA requirements for banks).

¹² 12 U.S.C. 1790d(e).

¹³ 12 U.S.C. 1790d(e)(1).

¹⁴ 12 U.S.C. 1790d(e)(2).

decrease is necessary to avoid a significant redemption of shares and further the purpose of that PCA provision of the Act. The Act also requires the Board to periodically review any order issued under that section.¹⁵

Separately, the Act sets forth requirements related to NWRPs, which FICUs must submit to the NCUA when it becomes undercapitalized.¹⁶ The regulatory provisions addressing the procedures and documentation requirements for NWRPs are codified at 12 CFR 702.111 and are detailed below.

B. Regulatory Provisions

In February 2000, the Board adopted part 702 and subpart L of part 747 establishing a comprehensive system of PCA that combines mandatory supervisory actions prescribed by the statute with discretionary supervisory actions developed by the NCUA (2000 final rule).¹⁷ Each of these supervisory actions is indexed to the five statutory net worth categories noted above. The 2000 final rule also permits the NCUA to impose “other action to better carry out the purpose of PCA” than any discretionary supervisory action available in that category.¹⁸ In the proposal that provided the basis for the 2000 final rule, the Board noted that “[p]art 702 also amplifies the terms of the statutory exception to the 0.4 percent minimum set aside. Specifically, the Board stated that it interprets the phrase *by order* to indicate that exceptions to the 0.4 percent statutory minimum are to be granted on a case-by-case basis.”¹⁹ But the Board revisited this interpretation in the May 2020 interim final rule on this subject, finding that the Act does not require FICUs to send a specific application or the NCUA to issue individual orders for each FICU.²⁰ The Board also notes that the current, specific requirements on earnings retention

¹⁵ 12 U.S.C. 1790d(e)(2)(B).

¹⁶ 12 U.S.C. 1790d(f).

¹⁷ 65 FR 8560 (Feb. 18, 2000).

¹⁸ 12 CFR 702.107(b)(9), which applies to undercapitalized FICUs.

¹⁹ 64 FR 27090 (May 18, 1999).

²⁰ 85 FR 31952, 31954 (May 28, 2020).

waivers are based on a regulatory provision rather than a specific statutory directive.²¹ Thus, issuing a broadly applicable order is consistent with the overall statutory structure of PCA, which combines both mandatory and discretionary provisions. During the COVID-19 pandemic, many FICUs have broadly faced similar economic circumstances that affect net worth and earnings. Given these experiences, and the potential for similar volatility and uncertainty in the future, the Board has determined it is appropriate to implement the changes in this rule to extend the provisions that authorize a broadly applicable order to decrease the earnings-retention requirements for multiple FICUs and to allow a streamlined NWRP in certain circumstances.

III. Recent Interim Final Rules

A. May 2020 Interim Final Rule

On May 21, 2020, the Board approved an interim final rule that temporarily amended two provisions in the PCA regulations in part 702.²² The first amendment addressed the earnings retention requirement in §702.201 for FICUs classified as adequately capitalized.²³ The second amendment addressed the NWRPs for FICUs in §702.206(c) that have become undercapitalized.²⁴

The May 2020 interim final rule was issued in response to the COVID-19 pandemic and sought to ensure that FICUs continue to operate efficiently, to ensure that FICUs maintain sufficient liquidity, and to account for the potential temporary increase in shares that FICUs may experience during the COVID-19 pandemic. Specifically, the Board believed the temporary

²¹ The Board notes that 12 U.S.C. 1790d(e)(1) requires earnings retention. However, additional provisions in 12 CFR part 702, including those related to timing and the content of the application, supplement this statutory provision.

²² 85 FR 31952 (May 28, 2020) (“2020 PCA interim final rule”).

²³ As detailed subsequently in this preamble, the NCUA’s 2015 final rule (80 FR 66626 (Oct. 29, 2015)) on risk-based capital went into effect on January 1, 2022, and amended certain provisions in part 702. As a result, the earnings retention requirement in §702.201 was moved to §702.106. Accordingly, this interim final rule implements the amendment made by the 2020 and 2021 PCA interim final rules to §702.201 in §702.106.

²⁴ As detailed subsequently in this preamble, the NCUA’s 2015 final rule on risk-based capital went into effect on January 1, 2022, and amended certain provisions in part 702. As a result, the requirements for NWRPs in §702.206(c) were moved to §702.111(c). Accordingly, this interim final rule implements the amendment made by the 2020 and 2021 PCA interim final rules to §702.206(c) in current §702.111(c).

amendments in the interim final rule would allow FICUs to better utilize resources by reducing the administrative burden associated with a temporary increase in shares. The Board concluded that the amendments would provide FICUs with necessary additional flexibility in a manner consistent with the NCUA's responsibility to maintain the safety and soundness of the credit union system. The Board made the temporary amendments effective upon publication and specified that they would remain in place through the end of calendar year 2020. The Board sought comment on the interim final rule.

On June 5, 2020, pursuant to the changes made by the May 2020 interim final rule, the Board issued a temporary order decreasing the earnings retention requirement.²⁵ Specifically, the Board determined that, due to economic circumstances caused by the COVID-19 pandemic, decreasing the earnings retention requirements set forth in the NCUA's regulations was necessary to avoid a significant redemption of shares. This action would further the purposes of the PCA regulations. Accordingly, the Board ordered that any consumer FICU whose net worth classification, as defined in part 702 of the NCUA's regulations, was adequately capitalized between March 31, 2020, and December 31, 2020, could decrease its earnings retention requirement to zero as set forth in part 702. The order was effective through and including December 31, 2020.²⁶

As noted, the Board solicited comment on the May 2020 interim final rule. The Board received comments from a credit union trade association, two state credit union leagues, and an organization of state credit union supervisors. All commenters supported the interim final rule, and no commenter opposed it. All commenters stated that the changes were appropriate, noting that they provided regulatory relief and flexibility to credit unions to manage their liquidity and address financial hardships caused by COVID-19.

²⁵ <https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/temporary-order-decreasing-earnings-retention-requirement>.

²⁶ 12 CFR 702.301. The term consumer FICU is being used instead of the term natural person FICU. This terminology is being used for clarity, however, the term natural person FICU will continue to be used for the accompanying regulatory text changes for consistency with other sections of the NCUA's regulations.

The interim final rule's two provisions expired on December 31, 2020. All commenters requested that the temporary amendments be extended or made permanent. One commenter stated that if the economic dislocation caused by the pandemic lingers, the regulatory relief may be necessary beyond the end of 2020. Among the recommendations to extend the effective date were: (1) making the rule permanent; (2) extending the applicability until the COVID-19 pandemic was declared over by the Center for Disease Control or other Federal agency; or (3) making the end date December 31, 2021.

B. April 2021 Interim Final Rule

Based on information available in December 2020, the Board did not extend these provisions but continued to consider this issue. In light of new facts and circumstances, the Board subsequently determined in April 2021 that it was appropriate to reinstate these amendments to the PCA regulations in part 702 on a temporary basis.²⁷ Specifically, based on the enactment of the American Rescue Plan Act of 2021²⁸ to provide direct financial relief to individual taxpayers, the Board expected that credit unions would receive a significant increase in deposits due to stimulus checks. Accordingly, the Board determined that it was appropriate to reinstitute the changes to the PCA provisions that had been adopted in May 2020. The Board also sought comments in the April 2021 interim final rule.

The NCUA received seven substantive comments in response to the interim final rule, all of which offered support. Commenters stated that the interim final rule provides assistance to FICUs that have experienced pandemic-related hardships; reduces regulatory burden; does not unduly increase risk to the NCUSIF; allows otherwise healthy FICUs to focus on serving members without discouraging deposits; provides FICUs and the NCUA flexibility during a time of unprecedented deposit growth; and helps ensure the relief is available throughout the

²⁷ 86 FR 20258 (Apr. 19, 2021).

²⁸ Pub. L. 117-2 (Mar. 11, 2021).

pandemic and resulting economic turbulence. Commenters also addressed the duration of the extension, requesting that the termination date either be extended beyond March 31, 2022, or be made permanent.

C. This Interim Final Rule

As noted above, the two temporary PCA-related provisions are set to expire on March 31, 2022. Based on the agency's experience and lessons learned during the last two years as well as the ongoing economic fallout related to the COVID-19 pandemic, the Board has determined that it is appropriate to issue another interim final rule to extend these provisions until March 31, 2023. Share growth remains unusually high compared to pre-pandemic levels. Specifically, share growth from September 30, 2020, to September 30, 2021, exceeded 14 percent.²⁹ The COVID-19 pandemic and Congressional responses to it were the initial impetus for the two previous interim final rules that temporarily amended the two PCA provisions. While the environment that precipitated these temporary amendments has evolved, substantial uncertainties about the continued impact of the pandemic and the evolving economic environment remain. Macroeconomic uncertainty has been particularly significant over the last few months. Inflation, geopolitical tensions, and a new COVID-19 variant have introduced new economic challenges. Ultimately, the combined effects of these factors on share growth and net worth ratios could be quite significant, leading to potentially greater volatility in those measures in the year ahead.

Also, the flexibilities provided by these temporary amendments have proven to benefit both the NCUA and FICUs. The Board believes the agency can use these flexibilities judiciously to address challenges posed by the current environment and potential issues that may arise while the rule remains in effect without imposing any additional safety and soundness risk. Accordingly, the Board believes it is appropriate to extend these provisions until March 31, 2023. The Board requests comments on all aspects of this interim final rule.

²⁹ Average annual share growth in the 10 years preceding the pandemic was only 5.8 percent.

The Board notes that this interim final rule incorporates new amendatory language given that the agency's 2015 final rule on risk-based capital amended certain provisions in part 702.³⁰ Specifically, that final rule amended part 702 by removing §§ 702.201 and 702.206 and moving them, mostly unchanged, to new §§ 702.106 and 702.111. As a result, the current regulatory text does not reflect the April 2021 interim final rule. Because the Board is extending this authority, it is revising the affected provisions to include these authorities to run from the effective date of this interim final rule until March 31, 2023, to ensure there is no interruption in the flexibility.

IV. Section-by-Section Analysis

A. Section 702.106 — Earnings retention requirement for “adequately capitalized” FICUs

A FICU that is classified as “adequately capitalized” or lower must increase the dollar amount of its net worth quarterly by an amount equivalent to at least 1/10th of a percent of its total assets and must retain at least that amount (for a total of 0.4 percent annually) every quarter until it is “well capitalized.”³¹ The purpose of this provision is to restore a FICU that is less than well capitalized to a well-capitalized position in an incremental manner. The Board notes that newly chartered FICUs are excluded from this relief given that the relief is intended for FCUs experiencing growth as a result of the COVID-19 pandemic.

As discussed previously, current §702.106 provides that the Board may waive this requirement on a case-by-case basis upon application by an affected FICU. The Act provides broader authority for the Board to issue an order to waive this requirement and does not require an application or individual orders.³² In response to recent economic conditions, there were previous infusions of stimulus funds and an increased propensity for consumers to save due to the variety of pandemic-related circumstances. Thus, the Board has determined that it is appropriate to extend its decision to amend §702.106 temporarily to provide express regulatory

³⁰ 80 FR 66626 (Oct. 29, 2015).

³¹ This relief is provided for FICUs that are required to retain earnings under §§ 702.106, 702.107, 702.108, and 702.109.

³² See 1 U.S.C. 1 (providing that unless context indicates otherwise, words importing the singular also apply to several persons or parties).

authority for the Board to issue a single order waiving the earnings retention requirement for all FICUs that are classified as adequately capitalized during this time. As with the previous orders issued under the May 2020 and April 2021 interim final rules, the Board would provide in the order that the applicable Regional Director has authority to subsequently require an application if a particular FICU poses undue risk to the NCUSIF or exhibits material safety and soundness concerns. Extending this regulatory provision will allow the Board to respond to circumstances broadly affecting many FICUs with a single issuance rather than numerous individual waiver approvals. This provision will expire on March 31, 2023.

In a separate action that will be published on the NCUA website after this interim final rule becomes effective, the Board intends to issue the order described above, which will be applicable to adequately capitalized FICUs and will grant relief from the earnings retention requirement without requiring those FICUs to submit applications and receive individual waiver approvals, subject to the qualification noted above.

The Board is exercising this authority under 12 U.S.C. 1790d(e)(2) to enhance flexibility in the application of the earnings retention requirement. The Board believes that this relief remains necessary to avoid a reduction of shares and thus retain system liquidity and capital adequacy, thereby furthering the purpose of PCA. Economic uncertainty caused by the COVID-19 pandemic and its effect on the economy have resulted in significant asset growth within the credit union industry. This growth may impact the PCA classification of many credit unions, resulting in an increased number of credit unions being subject to the earnings retention requirement. Based on the September 30, 2021, Call Report, 223 credit unions are classified as less than well capitalized and are thus subject to the earnings retention requirement. Of those, 42 percent report negative earnings as of September 30, 2021. With continued uncertainty caused by the COVID-19 pandemic, the credit union system continues to experience the effects of pandemic-related share growth and additional credit unions may be subjected to the earnings retention requirement. A comparison of Call Report data from March 31, 2020, to September 30,

2021, reveals 101 credit unions experienced a decline in their PCA classification from “well capitalized” to “adequately capitalized” from March 31, 2020, despite having reported a positive return on average assets in September 2021. This illustrates the continued impact of the flight to safety experienced by the industry.

Specifically, during the time period that the two interim final rules have been effective, the Board issued orders providing that any consumer FICU that had a net worth classification, as defined in part 702 of the NCUA’s regulations, of adequately capitalized could decrease its earnings-retention requirement to zero as set forth in part 702. These orders enabled FICUs to better utilize resources by eliminating the need to request a waiver of the earnings-retention requirement from their Regional Director. While the interim final rules and earnings-retention orders have been in effect, the number of FICUs that benefitted from this relief has varied from an estimated 77 FICUs as of June 2020 to as many as 179 as of June 30, 2021, based on Call Report data. The FICUs benefitting from the earnings-retention requirement reduction have assets representing less than one percent of industry assets as of September 30, 2021. Accordingly, the Board believes that this amendment and the implementing orders have not posed an undue risk to the NCUSIF.

The Board further notes that FICU operations continue to be significantly disrupted due to social distancing practices, remote work, supply chain disruption, and related complications. Also, the unprecedented amount of fiscal stimulus and decreased spending opportunities have led to a significant increase in the personal saving rate over the last two years. This, in turn, has resulted in extraordinary share growth, leaving net worth ratios artificially depressed.

Given current macroeconomic conditions, downward pressure on net worth ratios will likely persist in the coming year. Although consumer spending has rebounded somewhat, the amount of excess savings—the accumulation of savings over and above pre-pandemic levels—remains significant and is not likely to abate any time soon. Consumer spending on services—the most significant share of expenditures—continues to lag, as the pandemic is resulting in consumers

spending less on travel and other activities that are highly social and could potentially expose them to COVID-19. Also, strong gains in employment are supporting incomes and certain loan forbearance programs—which decrease debt service payments—still remain in effect.

By avoiding the need for numerous waiver applications and responses, the simplified procedure that this interim final rule extends will reduce the administrative burden on FICUs and the NCUA. The Board notes qualifications in the planned order regarding FICUs that pose undue risk or material safety and soundness concerns will help ensure that the purposes of PCA are maintained during this time.

B. Section 702.111 — NWRPs; Contents of NWRP

As for NWRPs, the Act provides a broad directive that a FICU that is less than adequately capitalized must submit an applicable NWRP to the NCUA. The NCUA, by regulation, has provided additional details to supplement this statutory provision. Section 702.111(a) of the NCUA's regulations specifies the schedule for filing the plan, and §702.111(c) of the NCUA's regulations outlines the contents of a NWRP.

The Board has decided that it is appropriate to continue waiving the NWRP content requirements for FICUs that become classified as undercapitalized predominantly as a result of share growth for Call Reports filed for the periods effective March 31, 2022, June 30, 2022, September 30, 2022, and December 31, 2022. In these cases, the FICU may submit a significantly simpler NWRP to the applicable Regional Director noting that the FICU's PCA classification fell to undercapitalized because of share growth. Specifically, a FICU would be required to attest that its reduction in capital was caused by share growth and that such share growth is a temporary condition due to the COVID-19 pandemic. Federally insured, state-chartered credit unions must comply with applicable state requirements when submitting NWRPs for state supervisory authority approval.

When reviewing NWRPs submitted under this authority, the Regional Director will determine if the decrease in the net worth ratio was predominantly a result of share growth. To

assess the reason for the decrease, the Regional Director will analyze the numerator and denominator of the net worth ratio. If there is no change, or if there is an increase in the numerator and an increase in the denominator, this would indicate that the decrease in the net worth ratio was due to share growth. If there is an increase in the denominator and a decrease in the numerator, the Regional Director will analyze whether the decrease in the numerator would have caused the FICU to fall to a lower net worth classification if there were no change in the denominator. If so, the FICU's net worth decline would not be predominantly due to share growth, and thus the FICU would not be eligible to submit a streamlined NWRP.

The Board has determined it is appropriate to extend this regulatory flexibility for NWRPs given the continued economic disruption and the corresponding uncertainty caused by the COVID-19 pandemic.

Since the Board published the interim final rule on May 28, 2020, permitting FICUs that become classified as undercapitalized as a result of share growth to submit a streamlined NWRP, fourteen credit unions have submitted such streamlined NWRPs. Of the fourteen streamlined NWRPs submitted, nine NWRPs were approved, and five streamlined NWRPs were denied. The denials of the streamlined NWRPs were based on those FICUs' decline in PCA classification being the result of other economic factors, and not predominantly the result of share growth. Further, the Board notes that the FICUs submitting streamlined NWRPs were generally smaller, or non-complex credit unions, thus presenting limited risk to the NCUSIF.

Based on September 30, 2021, Call Report data, 59 FICUs would require a NWRP to be in place or be submitted for approval based on their PCA classification. This is an increase of over 22 percent from the 48 credit unions required to have a NWRP to be in place or be submitted for approval based on December 31, 2020, Call Report data, illustrating an upward trend.

The streamlined NWRP will provide sufficient information, based on current economic conditions, to determine if the credit union is prepared to manage the volatility associated with the COVID-19 pandemic and the impact on the FICU's financial and operational position.

As it concluded in the April 2021 interim final rule, the Board continues to believe it can fulfill its statutory duty to evaluate the NWRPs even if the plans are more concise and streamlined than plans submitted before the COVID-19 pandemic. Such a streamlined approach is acceptable because the more extensive information required under the current requirements may not be practicable or useful under the current situation. The Board believes it can determine if a plan is acceptable even if it lacks some of the detailed submissions that the permanent regulatory provision requires.

A FICU's eligibility to submit a streamlined NWRP to the NCUA will be determined based on the effective date of the credit union's PCA classification, as defined in part 702 of the NCUA's regulations.³³ The streamlined NWRP will apply on a case-by-case basis to FICUs that become classified as undercapitalized (those that have a net worth ratio of 4 percent to 5.99 percent) predominantly as a result of share growth. To further clarify, a FICU that has a declined PCA classification will be permitted to submit a streamlined NWRP as reflected in the following table.

Call Report Effective Date	PCA Classification Date	Streamlined NWRP Permissible
March 31, 2022	April 30, 2022	Yes
June 30, 2022	July 30, 2022	Yes
September 30, 2022	October 31, 2022	Yes
December 31, 2022	January 30, 2023	Yes
March 31, 2023	April 30, 2023	No

V. Regulatory Procedures

³³ 12 CFR part 702.

A. Administrative Procedure Act

The Board is issuing the interim final rule without prior notice and the opportunity for public comment and the delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).³⁴ Pursuant to the APA, general notice and the opportunity for public comment are not required about a rulemaking when an “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”³⁵

The Board believes the public interest is best served by implementing the interim final rule immediately upon publication in the *Federal Register*. The Board notes that the economic disruption caused by the COVID-19 pandemic is unprecedented. Even after nearly two years, the situation continues to evolve, thereby making it difficult to anticipate how pandemic-induced disruptions will manifest themselves within the financial system and how individual FICUs may be impacted. The continued relief measures, including the most recent infrastructure legislation, combined with the flight to safety and reduced spending, places a strain on FICU net worth. To disrupt or end the regulatory relief in place would conflict with preserving the safety and soundness of the industry. Because the unprecedented expansionary monetary and fiscal policies, combined with precautionary savings, is placing a strain on FICU net worth, the Board believes it has good cause to determine that ordinary notice and public procedure are impracticable and that moving expeditiously in the form of an interim final rule is in the public’s best interests and the FICUs that serve that public. The temporary regulatory changes are necessary steps designed to alleviate potential liquidity and resource strains including stress on capital adequacy and are undertaken with expedience to ensure the maximum intended effects are in place at the earliest opportunity.

³⁴ 5 U.S.C. 553

³⁵ 5 U.S.C. 553(b)(3).

The Board values public input in its rulemakings and, to that end, believes that regulations are enhanced when the public has the opportunity to comment. Accordingly, the Board is soliciting comments on this interim final rule. The amendments made by the interim final rule will automatically expire on March 31, 2023 and are limited in number and scope. For these reasons, the Board finds there is good cause consistent with the public interest to issue the rule without advance notice and comment.

The APA also requires a 30-day delayed effective date, except for (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.³⁶ Because the rule relieves currently codified limitations and restrictions, the interim final rule is exempt from the APA's delayed effective date requirement. As an alternative to making the rule effective without the 30-day delayed effective date, the Board finds there is good cause to do so for the same reasons set forth above regarding advance notice and opportunity for comment.

B. Congressional Review Act.

For purposes of the Congressional Review Act (CRA),³⁷ the Office of Management and Budget (OMB) decides whether a final rule constitutes a “major” rule. If the OMB deems a rule to be “major,” the CRA generally provides that the rule may not take effect until at least 60 days following its publication.

The CRA defines a “major rule” as any rule that the Administrator of the OMB's Office of Information and Regulatory Affairs finds has resulted in, or is likely to result in, (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity,

³⁶ 5 U.S.C. 553(d).

³⁷ 5 U.S.C. 801-808.

innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.³⁸

For the same reasons noted above, the Board is adopting the interim final rule without the delayed effective date generally prescribed under the CRA. The delayed effective date required by the CRA does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.³⁹ In light of current market uncertainty, the Board believes that delaying the effective date of the rule would be contrary to the public interest for the same reasons discussed above.

As required by the CRA, the Board will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) requires OMB to approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a valid OMB control number. The information collection requirements prescribed by the May 2020 interim final rule under PCA remains in effect and are cleared under OMB control number 3133-0154.

D. Executive Order 13132

Executive Order 13132⁴⁰ encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency, as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive order to adhere to fundamental federalism principles. The interim final rule will not have substantial direct

³⁸ 5 U.S.C. 804(2).

³⁹ 5 U.S.C. 808.

⁴⁰ Executive Order 13132 on Federalism was signed by former President Clinton on August 4, 1999, and subsequently published in the *Federal Register* on August 10, 1999 (64 FR 43255).

effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. The Board has thus determined that this rule does not constitute a policy that has federalism implications for purposes of the Executive order. But the Board notes that it has consulted with state regulators, as described in the PCA section of the Act, and will continue to do so during the comment period and implementation of this interim final rule.⁴¹

E. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this interim final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.⁴²

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule or a final rule pursuant to the APA⁴³ or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the *Federal Register*.⁴⁴ Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers FICUs with assets less than \$100 million to be small entities.⁴⁵

As discussed previously, consistent with the APA,⁴⁶ the Board has determined for good cause that general notice and opportunity for public comment is unnecessary, and thus, the Board is not issuing a notice of proposed rulemaking. Rules that are exempt from notice and comment procedures are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Accordingly,

⁴¹ 12 U.S.C. 1790d(f).

⁴² Public Law 105–277, 112 Stat. 2681 (1998).

⁴³ 5 U.S.C. 553(b).

⁴⁴ 5 U.S.C. 603, 604.

⁴⁵ NCUA Interpretive Ruling and Policy Statement (IRPS) 15–1. 80 FR 57512 (Sept. 24, 2015).

⁴⁶ 5 U.S.C. 553(b)(3)(B).

the Board has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

Nevertheless, the Board seeks comment on whether, and to what extent, the interim final rule would affect a significant number of small entities.

List of Subjects in 12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements.

By the NCUA Board, this 17th day of February 2022

Melane Conyers-Ausbrooks
Secretary of the Board

For the reasons set forth in the preamble, the Board is amending 12 CFR part 702 as follows:

PART 702—CAPITAL ADEQUACY

1. The authority citation for part 702 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1790d.

2. Amend § 702.106 by redesignating paragraphs (b)(1) and (2) as paragraphs (b)(1)(i) and (ii), respectively, and adding a new paragraph (b)(2) to read as follows:

§ 702.106 Prompt corrective action for adequately capitalized credit unions.

* * * * *

(b) * * *

(2) Notwithstanding paragraph (a) of this section, from [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*], until March 31, 2023, for a credit union that is adequately capitalized:

(i) The NCUA Board may issue an administrative order specifying temporary revisions to the earnings retention requirement, to the extent the NCUA Board determines that such lesser amount—

(A) Is necessary to avoid a significant redemption of shares; and

(B) Would further the purpose of this part.

(ii) Despite the issuance of an administrative order under paragraph (b)(2) of the section, the Regional Director may require a credit union to submit an earnings retention waiver under paragraph (b)(1) if the credit union poses an undue risk the National Credit Union Share Insurance Fund or exhibits material safety and soundness concerns.

* * * * *

3. Amend § 702.111 by adding paragraph (c)(4) to read as follows:

§ 702.111 Net worth restoration plans (NWRP).

* * * * *

(c) * * *

(4) Notwithstanding paragraphs (c)(1), (2), and (3) of this section, the Board may permit a credit union that is undercapitalized to submit to the Regional Director a streamlined NWRP attesting that its reduction in capital was caused by share growth and that such share growth is a temporary condition due to the COVID-19 pandemic. A streamlined NWRP plan may be accepted from [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*], until March 31, 2023.

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